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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

XIA SUN,

Plaintiff and Respondent,

v.

JU-TSUN CHANG,

Defendant and Appellant.

B281008

(Los Angeles County  
Super. Ct. No. BC561165)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

Gary Hollingsworth for Defendant and Appellant.

David A. Cooper for Plaintiff and Respondent.

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In 2010, plaintiff Xia Sun (Sun) created a small business called Solar Plus, Inc. (Solar Plus) to support her request for permanent residence in the United States under this country's EB-5 program.<sup>1</sup> Sun invested \$500,000 in Solar Plus, and she hired defendant Ju-Tsun (George) Chang (Chang) to manage the company. By 2014, however, Solar Plus was insolvent, and the United States Citizenship and Immigration Service (USCIS) had denied Sun's residency request, concluding that her representations about Solar Plus's business activities were untrue.

Sun sued Chang for a variety of torts, including fraud, and common counts. At trial, Sun contended that Chang never intended to operate Solar Plus as its general manager, but instead drained Solar Plus of its cash and created false reports of the company's purchases and sales. Sun also contended that she made personal loans to Chang of \$60,000, which he did not repay. A jury agreed and awarded Sun damages of \$545,000. Chang appealed from the judgment.

We affirm. As we discuss, substantial evidence supported the jury's verdict, and the trial court did not abuse its discretion by awarding sanctions against Chang's trial counsel, denying Chang's motions to compel discovery, and denying Chang's request to audit Solar Plus. Accordingly, there is no basis on which to reverse the judgment.

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<sup>1</sup> Under the EB-5 program, entrepreneurs are eligible to apply for permanent residence if they make a statutorily sufficient investment in a commercial enterprise in the United States that creates or preserves 10 permanent full-time jobs for U.S. workers. (<<https://www.uscis.gov/eb-5> <as of July 22, 2019>).

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I.**

#### **Background**

Sun was born in China and moved to the United States in 2007. She was introduced to Chang by a mutual friend. Chang owned two companies—Min Maw International (Min Maw) (also called MMI and MMI Tek) and ChiefPick.com (ChiefPick)—which bought and sold merchandise. Min Maw and ChiefPick occupied a warehouse in the City of Industry, which Chang owned.

In 2010, Sun began the process of obtaining an EB-5 visa, with the goal of becoming a permanent resident of the United States. An EB-5 investor must invest \$500,000 in a United States company that will create or preserve at least 10 full-time jobs in targeted employment areas. As part of the EB-5 process, Sun created Solar Plus, deposited \$500,000 in its bank account, and hired Chang to manage the business.

Between 2010 and 2014, Sun communicated her knowledge of Solar Plus's operations to the USCIS for the purpose of obtaining permanent residence in the United States. In 2013 and 2014, Sun reported to the USCIS that she had continuously met her capital investment requirement for two years and had created at least 10 full-time jobs. In September 2014, the USCIS concluded that Sun had not established that these representations were true, and it denied her application. Later that month, Sun dissolved Solar Plus and left the United States.

### **II.**

#### **The Present Action**

In October 2014, Sun and Solar Plus filed an action against Chang and Min Maw for fraud, promissory estoppel, conversion, conspiracy, breach of fiduciary duty, and a common count based

on alleged unpaid loans. Chang and Min Maw filed a cross-complaint against Sun and Solar Plus alleging causes of action for breach of contract to pay salary and rent, equitable indemnity, equitable contribution, and fraud.<sup>2</sup>

Sun's and Solar Plus's fraud and unpaid loan claims, and Chang's and Min Maw's breach of contract claims, were tried to a jury. The evidence presented included the following:<sup>3</sup>

*A. Sun's Personal Loans to Chang (Common Count)*

Sun testified that in August 2012, she made a personal loan of \$20,000 to Chang. About a month later, she loaned him an additional \$40,000. Chang did not repay any portion of the loans.

Chang testified that he did not borrow \$60,000 from Sun. He signed a promissory note because Sun's husband "and other people" threatened him.

*B. Chang's False Representation to Manage Solar Plus (Fraud Claim)*

*1. Sun's Evidence*

Sun testified that Chang agreed to manage Solar Plus for a salary of \$2,000 per month. As Solar Plus's manager, Chang hired all of Solar Plus's employees and managed all of its operations. Sun was not involved in hiring any of Solar Plus's employees, did not write any checks on behalf of Solar Plus, and was not involved in Solar Plus's management. She did not know

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<sup>2</sup> Solar Plus and Min Maw are not parties to this appeal.

<sup>3</sup> Because Chang does not challenge the jury's verdict on his breach of contract claims, we do not discuss the evidence relevant to those claims.

who Solar Plus was buying from or selling to, or how many employees it had.

Sun's trial evidence demonstrated that nearly all of Solar Plus's purported purchases between June 2010 and February 2014 were from ChiefPick and MM Precision, a dba of Min Maw. By February 2012, Solar Plus had written checks to these companies in amounts exceeding \$400,000. However, Chang could not identify any documents, such as shipping receipts or purchase orders, demonstrating that ChiefPick or MM Precision ever shipped merchandise to Solar Plus, or that Solar Plus ever received merchandise from ChiefPick or MM Precision.

Sun's trial evidence also demonstrated that between 2010 and 2015, Chang signed checks made out to "cash" in amounts exceeding \$100,000. Chang was not able to account for these withdrawals.

Finally, Sun's trial evidence demonstrated that between June 2010 and February 2014, most of Solar Plus's sales were to MMI Tek, another dba of Min Maw. MMI Tek never paid Solar Plus for much of the merchandise it allegedly purchased: Solar Plus's financial statements showed that its accounts receivable from MMI Tek exceeded \$420,000 in February 2012, \$582,000 in February 2013, and \$850,000 in February 2014. Robert Macburney, Sun's forensic accountant, testified that these records suggested that by February 2014, "George Chang's company, assuming that that's the main purchaser, owe[d] \$827,000 to the company that he supposedly manages."

## 2. Chang's Evidence

Chang acknowledged that he signed a written agreement to manage Solar Plus's business, but he testified that he "never intended to be [Solar Plus's] manager." He testified as follows:

“A: I’m aware the agreement is to become the manager of the company. However, I did not really handle matters as a manager. What I want to clarify is that I wasn’t really the manager. I was just helping out. [¶] . . . [¶]

“Q: So you’re saying that when you signed this it was different from your intention basically[,] is that right?

“A: Correct.”

Chang testified that Sun, not he, ran Solar Plus’s business. He was not involved in Solar Plus purchases or sales, and all of Solar Plus’s money was under Sun’s control. Chang acknowledged that he signed checks made out to “cash,” but he said that he did so only as requested by a woman named “Diana,” who acted as the accountant for Min Maw, ChiefPick, and Solar Plus. There were many checks written to “cash” because “Ms. Sun prefers to use cash.” Chang said he did not necessarily receive the cash in these transactions because “[a]nybody could go to the bank and get the money out.” Chang did not know where Diana was because she “disappeared all of a sudden.”

Chang admitted that Solar Plus purchased some merchandise from ChiefPick, but said it did so “rarely.” He could not identify any products Solar Plus purchased from ChiefPick, and he could not identify the supplier from whom ChiefPick purchased those products.

Chang testified that he had not been able to locate any of ChiefPick’s or Solar Plus’s records. He said the records had been maintained electronically but the “computers disappeared.”

### *C. Closing Arguments*

In closing argument, Sun’s attorney urged the jury to conclude that Chang intentionally misrepresented to Sun that he would manage Solar Plus, but he never intended to do so. In

support, counsel argued that Chang admitted that he did not intend to be Solar Plus's manager; Chang intended Sun to rely on his representation that he would manage Solar Plus, and she did, allowing him to manage her \$500,000 investment; her reliance was reasonable because she had known Chang for several years as a successful businessman; her reliance was a substantial factor in causing her harm, because but for his agreement to manage Solar Plus, she would not have invested \$500,000 in the company; and her damages were \$500,000, the amount of her investment in Solar Plus. Counsel also argued that Chang failed to pay back the \$60,000 he borrowed from Sun.

Chang's attorney argued that Solar Plus "wasn't a sham corporation made up by Mr. Chang to sort of cycle the money through shell companies to himself. . . . This was an actual business." He urged that the best evidence that Solar Plus was actually doing business were Sun's own submissions to the USCIS, which said Solar Plus was engaged in business and had 10 employees. He also urged the jury to look at the bank records, which "prove[] . . . that Solar Plus was actually engaged in business, doing substantial business."

*D. Verdict; Appeal*

The jury returned special verdicts for Sun on her claims for intentional misrepresentation and failure to repay loans, and it awarded her compensatory damages of \$460,000.<sup>4</sup> The jury also returned verdicts for Sun on Chang's and Min Maw's claims for breach of contract claims. Finally, on Sun's claim for punitive damages, the jury found by clear and convincing evidence that

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<sup>4</sup> Although both Sun and Solar Plus were parties to the complaint, the verdict was rendered in favor of Sun only.

Chang acted with malice, oppression, or fraud. Following a court trial, the court awarded Sun exemplary damages of \$85,000.

On February 3, 2017, the court entered judgment for Sun and against Chang in the amount of \$545,000, plus costs of \$12,672. Chang timely appealed from the judgment.

## **DISCUSSION**

Chang contends: (1) substantial evidence does not support the judgment; (2) there was a substantial variance between the fraud claim Sun pled and the one she attempted to prove; (3) the trial court abused its discretion by denying Chang’s motions to compel discovery; (4) the trial court abused its discretion by awarding sanctions against Chang’s trial counsel; and (5) the trial court abused its discretion by denying Chang’s request to audit Solar Plus.<sup>5</sup> As we now discuss, none of these contentions has merit.

### **I.**

#### **Substantial Evidence Supports the Judgment**

Chang contends there was no evidence that he misappropriated Sun’s investment capital rather than spending it for legitimate business purposes. In support, he relies almost exclusively on his own evidence, including his testimony that he did not manage Solar Plus’s accounting or purchase orders, that all decisions about purchases and sales were made by Sun, that he was required to get Sun’s approval before making purchases

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<sup>5</sup> Chang’s statement of issues on appeal includes an additional issue—namely, whether “the Cross-Complaint for salary and rent owed, totaling \$411,056.00, be awarded to Appellants and against Respondents based on clear evidence?” However, Chang’s opening brief does not contain argument on this issue, and thus we do not address it on the merits.



from suppliers, that Sun took the business records home with her every day, and that Sun reviewed the bank records every month.

In urging us to credit his evidence, rather than Sun's, Chang misapprehends the role of an appellate court. When a jury's verdict is challenged on appeal, we review the record under the highly deferential substantial evidence standard of review. In doing so, the sole question before us " 'is whether the evidence reveals substantial support—contradicted or uncontradicted—for the [jury's] conclusion that the weight of the evidence supports the [plaintiff's] findings of fact.' [Citation.] We do 'not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its favor.' [Citation.] 'When more than one inference can be reasonably deduced from the facts, [we] cannot substitute [our] deductions for those of the [jury].' [Citation.] If 'substantial evidence supports the [jury's] findings and conclusions, the judgment must be affirmed.' [Citation.]" (*Ricasa v. Office of Administrative Hearings* (2018) 31 Cal.App.5th 262, 282.)

In the present case, there was more than substantial evidence to support the jury's conclusion that notwithstanding Chang's promise to manage Solar Plus, he did not use Sun's investment capital for legitimate business purposes. That evidence included the following:

- Sun testified that she had no role in the day-to-day management of Solar Plus and she did not review any of the company's documents generated by Solar Plus. The company was solely managed by Chang.

- In the five years that he managed Solar Plus, Chang withdrew more than \$100,000 in checks made out to “cash.”

Chang was not able to account for these withdrawals.

- Solar Plus’s bank records showed that between 2010 and 2014, Solar Plus paid hundreds of thousands of dollars to Chang’s companies, ChiefPick and Min Maw dba MM Precision, for “purchases.” However, Chang could not identify *any* documents, such as shipping receipts or purchase orders, demonstrating that ChiefPick or MM Precision ever shipped merchandise to Solar Plus.

- Solar Plus’s accounting records showed that nearly all of its sales were to MMI Tek, a dba of Min Maw. By August 2014, MMI Tek owed Solar Plus more than \$800,000.

Chang urges that we should not credit Sun’s evidence because it contradicted her statements to the USCIS. But Sun testified at trial that she could not read the immigration documents she signed because they were in English<sup>6</sup>, and that she subsequently learned they contained statements that were not true. Chang cites no authority for the proposition that the jury was required to credit Sun’s statements to the USCIS, rather than her testimony at trial.

Chang also asserts that Sun did not establish fraud because “mismanagement is not a tort.” But as we have said, Sun did not allege mere mismanagement; instead, she presented substantial evidence that Chang used Solar Plus as a vehicle for enriching himself by transferring its assets to himself or companies he controlled.

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<sup>6</sup> Sun testified that she cannot read English.

For all of these reasons, Chang’s substantial evidence claim is without merit.

## II.

### **Chang Has Not Established a Substantial Variance Between the Fraud Claim Sun Pled and Proved**

Chang asserts Sun pled a different fraud claim than the one she attempted to prove at trial. Specifically, he asserts that Sun “alleged fraud which consisted of conversion of Sun’s investment capital, money cycled through Chang’s overseas affiliates, and Chang submitted fraudulent documents to the USCIS,” but attempted to prove the “different tort of misappropriating Solar Plus’ investment capital . . . by mismanaging the company.”

We do not agree that there was a variance between the fraud claim Sun pled and proved.<sup>7</sup> Plaintiff’s cause of action for fraud alleged that “in or about March through May 2010 [Chang] stated to Plaintiffs his intention to manage Solar Plus, Inc. as an independent operation within the existing warehouse and office space of [Min Maw],” but that these representations were false. “Rather, Chang’s true intention was to manage Solar Plus, Inc. as a mere instrumentality of his existing company [Min Maw], to take Solar Plus’s investment capital as his own or his company’s

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<sup>7</sup> Civil Code section 3294 defines fraud as “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (Civ. Code, § 3294, subd. (c)(3); see *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 21–22.)

own, and to provide false and misleading information to Plaintiffs and Plaintiffs' agents in order to disguise his true intentions."

Sun's attorney's closing argument to the jury closely tracked the allegations of the complaint. Counsel argued: "The question is: Do you believe that when [Chang] made the promises, which are memorialized in writing—we have a written memorialization of the promises—do you believe that when he made the promise to manage the company in a normal way, which means to not do fake bookkeeping, to not do fake accounting, to not immediately send [Solar Plus] into a nose dive, to not report falsely to tax authorities how much you're making, to not give the immigration service conflicting invoices that don't match up with the deposits. [¶] [When Chang agreed] to be the manager, did he intend to do otherwise at the time? Did he make the promise to get her to pay her money, and at the same time he did not intend to keep his promises? That's the key." Counsel then suggested that Chang never intended to keep his promise to manage the company: "I think that my client was a mark, an easy mark. I think that he saw this as a chance to make a pretty easy amount of money, \$100,000 in cash, rent every month. . . . [¶] . . . [¶] I think he made promises. He made a promise to be a manager. He made other promises. Remember he said, 'I know the suppliers. I know the buyers.' This is what he said. 'I have the warehouse in place. I'll do it. I know what to do. I'll be the manager.' He signed it. 'I'll be the manager.' I think that's what he said, but that's not what he intended to do, because immediately it went sideways."

In short, the fraud claim that Sun alleged—that Chang promised to properly manage Solar Plus with no intention of

doing so—was the very same claim she proved at trial. Chang’s contention to the contrary is without merit.

### III.

#### **The Trial Court Did Not Abuse Its Discretion in Its Discovery Rulings**

##### *A. Chang’s Motions to Compel Further Discovery*

On June 1, 2015, Chang filed eight motions to compel further discovery. Sun and Solar Plus opposed the motions on a variety of grounds, including that they did not possess many of the documents Chang sought.

The trial court denied the motions to compel, finding as follows: “After arguments from both sides as to all the motions, the Court finds no basis to grant the above motions and all motions are denied without prejudice. The Court finds after lengthy discussions that Plaintiff does not have access to the said documents.”

Chang contends the trial court improperly denied his motions to compel further discovery. We find no prejudicial error.

“ ‘Management of discovery generally lies within the sound discretion of the trial court.’ [Citation.] “Where there is a basis for the trial court’s ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court’s determination will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question.” ’ (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396–1397.)” (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740.)

Our review of discovery orders is “highly deferential” to the trial court. (*Lickter v. Lickter, supra*, 189 Cal.App.4th at p. 740.)

Moreover, where, as here, an appellant did not seek writ review of the trial court's denial of his motion to compel, but instead sought review only on appeal from the judgment, he must show "not only that the trial court erred, but also that the error was prejudicial"—that is, that it is reasonably probable he would have prevailed at trial had the trial court granted his motions to compel. (*Ibid.*)

Chang has failed to make this showing. Among other deficiencies, he has cited no legal authority demonstrating the absence of a legal justification for the order denying further discovery responses, and he has made no showing that he was likely to have prevailed at trial if the trial court had granted his motions to compel. Under the circumstances of this case, therefore, Chang has not demonstrated that the trial court prejudicially erred by denying his motions to compel.

*B. Sanctions Award Against Chang's Trial Counsel*

Chang contends that the trial court abused its discretion by awarding sanctions of \$500 against trial counsel. Chang is not the proper party to make this argument on appeal because Code of Civil Procedure section 904.1, subdivision (b) authorizes an appeal of a sanction ruling only by the party against whom the sanctions were imposed, who is the aggrieved party. (See, e.g., *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42; *People v. Indiana Lumbermens Mutual Ins. Co.* (2014) 226 Cal.App.4th 1, 10.) Further, the contention fails because the appellate record does not include the February 17, 2015 sanctions order, and appellant's opening brief does not contain any reasoned argument for reversal of the sanctions order. Accordingly, the record is insufficient to permit adequate review of the sanctions order. (See, e.g., *Ritschel v. City of*

*Fountain Valley* (2006) 137 Cal.App.4th 107, 122–123 (*Ritschel*) [“An appellate court begins with the presumption the judgment is correct [citation] and the appellant must prepare a record that adequately establishes the trial court committed prejudicial error. [Citations.] ‘Obviously, . . . the presentation of a record which is clearly insufficient to enable a reviewing court to determine whether or not the trial court was correct in its ruling is not the equivalent of demonstrating that the trial court was in error.’ ”].)

*C. Denial of Chang’s Request for an Audit*

Chang asserts that the trial court prejudicially erred by denying his request to conduct an audit of Solar Plus’s accounts. However, our appellate record does not contain a motion to compel an audit, and Chang’s record citation in support of his contention that he made such a motion is to a single page of his motion to quash a deposition subpoena. Manifestly, a motion to quash a deposition subpoena is not a motion to compel an audit. Accordingly, the record is insufficient to permit review of Chang’s contention that the trial court erred in denying his request for an audit. (*Ritschel, supra*, 137 Cal.App.4th at pp. 122–123.)

**DISPOSITION**

The judgment is affirmed. Sun is awarded her appellate costs.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.